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No. 1211

In the Supreme Court of the United States

OCTOBER TERM, 1967

MILTON L. STERN, PETITIONER

v.

THOMAS L. ROBINSON AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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On December 8, 1966, petitioner filed a complaint against the United States and respondent Robinson, United States Attorney for the Western District of Tennessee, asking for the return and suppression of evidence that petitioner claimed a Special Agent of the Internal Revenue Service obtained without first advising him of his constitutional rights or that a criminal investigation was in progress (Pet. App. A2–A7). The district court orally dismissed on December 15, 1966, holding that the complaint failed to state a claim for relief since it did not allege that petitioner was deceived or coerced into surrendering his records, and did not allege such custodial interrogation as would bring the case within the rule of *Miranda* v. *United States*, 384

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U.S. 436 (Pet. App. A11–A12). The next day the United States Attorney presented the evidence to the grand jury, and an indictment was returned (Pet. 3).[1] The Sixth Circuit dismissed the appeal on the ground that the district court's order was interlocutory (Pet. App. A23–A24).

1. There is no merit to the contention (Pet. 4–9) that the district court's order dismissing the complaint is final and appealable. The order is appealable only if petitioner's suit may be deemed independent of a criminal prosecution. Although the complaint prayed both for the return as well as the suppression of evidence (Pet. App. A7), petitioner's records, as he admits (Pet. App. A4), were returned to him before he filed suit. As a practical matter, then, suppression was the only relief at issue in the district court. In *Di-Bella* v. *United States*, 369 U.S. 121, this Court ruled that an order denying suppression is unappealable if entered after return of the indictment, saying, (369 U.S. at 131–132):

> * * * Only if the motion is *solely* for *return* of property *and* is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent. * * * [Emphasis supplied.]

This rationale requires the same result here, as is demonstrated by the Court's action remanding two cases to the Second Circuit with instructions to dis-

[1] We are informed that the trial is presently set for June 17, 1968.

miss the appeals upon the authority of *DiBella*. *Grant* v. *United States*, 369 U.S. 401, and *Greene* v. *United States*, 369 U.S. 403. In neither case had any criminal process been instituted prior to the time the proceeding to suppress evidence was filed, although as here, the initial steps toward prosecution were taken before the appeal in the suppression action was dismissed.[2] See, also, *Smith* v. *United States*, 377 F. 2d 739 (C.A. 3); *Parrish* v. *United States*, 376 F. 2d 601 (C.A. 4); *Austin* v. *United States*, 297 F. 2d 356, appeal dismissed, 353 F. 2d 512 (C.A. 4); *Hill* v. *United States*, 346 F. 2d 175 (C.A. 9), certiorari denied, 382 U.S. 956; *Badger Meter Mfg. Co.* v. *Brennan*, 216 F. Supp. 426 (E.D. Wis.), appeal dismissed, 63–1 USTC § 9332 (C.A. 7), certiorari denied, 373 U.S. 902.

2. In any event, petitioner's complaint failed to state a cause of action. There was no allegation of custodial interrogation within the meaning of *Miranda*. See *Schlinsky* v. *United States*, 379 F. 2d 735 (C.A. 1), certiorari denied, 389 U.S. 920; *Thomas* v *United States*, 370 F. 2d 96 (C.A. 5), certiorari denied, 386 U.S. 975; *United States* v. *Mansfield*, 381 F. 2d 961 (C.A. 7), certiorari denied, 389 U.S. 1015. Although petitioner alleged (Pet. App. A4) that the agents told him they could obtain his records by court order, this was not sufficient to show either deceit or coer-

[2] As to the *Grant* case, see 282 F. 2d 165, 167, 283 F. 2d 582 and 291 F. 2d 227.

As to the *Greene* case, see the government's opposition to the petition for certiorari, p. 7, No. 687, October Term, 1961.

cion.[3] *Grant* v. *United States, supra,* 291 F. 2d 227.

Respectfully submitted.

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Assistant Attorney General.
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APRIL 1968.

[3] The incident is not said to have occurred until the Special Agent's second visit; petitioner had given over documents on that agent's earlier visit, as well as when a Revenue Agent had come by himself (Pet. App. A2–A4).

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